



**State & Federal Contractors
Water Agency**

1121 L Street, Suite 802, Sacramento, CA 95814

October 18, 2010

Delta Stewardship Council
980 9th Street, Ste. 1500
Sacramento, CA 95814

Dear Chairman Isenberg and Council Members:

At your September meeting, you asked that we provide our perspective regarding the relationship of the Bay Delta Conservation Plan (BDCP) to the policy objectives established in the Delta Reform Act of 2009 (Act) "for management of the Delta". The objectives you asked about are set forth in section 85020 and 85021.

The simple answer is, of course, any action taken under the Delta Reform Act—including the BDCP—must comply with applicable constitutional, legislative and judicial policies. Those would include the policies set out in section 85020 of the Act as well as the legislative intent declared in section 85001 which cannot be ignored and provides the overarching context for application of section 85020: i.e., to "provide a more reliable water supply for the state" and to "protect and enhance the quality of water supply from the Delta" Moreover, along with Act's coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem," broader state policies also apply, including the *constitutional* mandate that the "general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable," consistent with reasonable use principles (Art. 10, §2).

We believe, and are working to ensure, that the BDCP will, consistent with the Act and all other applicable policies implicating water development and use and environmental protection, contribute to the achievement of all of these policies or portions thereof and as such the question of "applicability" of the Act to the BDCP is essentially moot. The fact is, assuming it is permitted as a NCCP/ HCP by the resource agencies and certified by the Department of Fish and Game (DFG) as having satisfied the CEQA requirements of the Act, implementation of the BDCP will further the policies the legislature established in section 85020 as "inherent in the coequal goals for management of the Delta".

With regard to section 85021, we interpret the question you are asking is whether it requires State Water Project (SWP) and Central Valley Project (CVP) exports from the Delta to be

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reduced, thus superseding the BDCP's original objectives as established in its purpose and need statement and requiring the BDCP to be revised? The answer to this question is firmly "no". The basis of our position is explained in detail in our letters to the Council dated May 26 and July 28, 2010 (copies attached).

We won't repeat that full analysis here, but we point out again that the words of the Act itself, when read as a whole and in conjunction with the whole of California's water policy objectives, support our view.

First and foremost, section 85021 is focused on meeting "**future** water supply needs," while the BDCP includes as a project objective the restoration of lost water supply reliability and recovery of baseline long-term average supplies that existed approximately a decade ago to meet then current needs. Interpreting section 85021 as requiring a BDCP that results in a reduction in SWP/CVP baseline water supplies as defined by the projects' long existing delivery contracts is in direct conflict with the language ("future") the Legislature actually used. In addition, section 85021 is targeted at a "statewide strategy" of investment within "each region that depends on water from the Delta watershed" to meet those future needs. A logical extension of an interpretation that section 85021 requires the BDCP to result in an absolute reduction in use of water derived from the Delta watershed is that all projects and users in the watershed must reduce current uses, contrary to the actual language that requires investment to "improve regional self reliance" to "meet future water supply needs."

Furthermore, the misinterpretation being suggested by the Council could lead one to conclude that any activity related to water transfers across the Delta and water banking south of the Delta to improve statewide water management capabilities would run afoul of section 85021 as well. The same misguided argument would also apply to investments in ecosystem enhancements, including those occurring independent of the BDCP, to benefit fisheries, potentially leading to removal or relaxation of project operational regulatory constraints resulting in "increased exports" at any given time while still meeting the coequal goals. Such an interpretation thus ironically would actually undermine state policy and create a disincentive to pursuing a comprehensive approach to management of the Delta and achieving the coequal goals for California.

The intent of the Act was not to tie California's water system in knots and further reduce the currently minimal level of flexibility it has to achieve the coequal goals. Rather the Legislature recognized that the approach of the BDCP is central to increasing the level of flexibility in the system to achieve the coequal goals most effectively while meeting the demands of the State's existing 35 million plus residents and the maintaining the productive capabilities of the millions of acres of agricultural lands already under cultivation.

Notwithstanding our view that section 85021 is limited in its application to projects and strategies for meeting future demands, we remind the Council that a major factor in California water managers' success in keeping water deliveries at the level they have in recent years despite the downward spiral in supplies and supply reliability is the significant investment water

agencies have made in conservation and the development of alternative supplies, resulting in close to a zero increase in cumulative water use in the face of population growth and economic expansion over the last quarter century or so. These investments will continue to be made into the future, consistent with section 85021. However, these necessary investments are outside the scope of the BDCP and the EIR/EIS analyzing its potential impacts and potential alternatives to meeting its project objectives.

California's "future water supply needs" i.e, the increment of increased demands due to population or other growth, will not be met with water supplies secured through the BDCP. The supplies BDCP seeks to restore are the foundation upon which the future supply strategies and investments contemplated in section 85021 can and will be built. For example, improved export water quality via an isolated transfer facility will allow many recycled water projects and groundwater conjunctive use projects to be feasible that otherwise would not be due to salinity constraints. Without a successful BDCP, one that meets its purpose and need, that foundation will itself be unacceptably weak and ineffective.. California can't live with that.

The Legislature mandated that the BDCP "shall" be incorporated into the Council's Delta Plan if it is permitted as an HCP and an NCCP and certified by the DFG as having satisfied the extra-CEQA requirements delineated in section 85320(e). This direction reflects the Legislature's determination that the BDCP is integral to achieving the policies specified in section 85020 as being "inherent in the coequal goals for management of the Delta."

In summary, as we expressed in response to your question at the September meeting, we believe the BDCP is subject to and consistent with all of the applicable policy objectives of California law, including section 85020 of the Act. However, section 85021 is not "applicable" to the BDCP in a manner that would somehow make the achievement of its purpose and need inconsistent with the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "BMB", with a stylized, flowing script.

BMB



State & Federal Contractors Water Agency

1121 L Street, Suite 802, Sacramento, CA 95814

May 26, 2010

Mr. Philip Isenberg, Chair
Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Dear Phil:

On behalf of the State and Federal Contractors Water Agency (SFCWA)*, I am writing to provide clarity regarding a key part of the historic legislative water policy package signed into law last year that is critical to the Council's mission but which we are concerned is being repeatedly mischaracterized in various forums. It is unfortunate that when misstatements are made often enough, they take on an aura of authenticity. The Council needs to guard against this.

Section 85021 of "Chapter 2. Delta Policy" states:

The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.
[Emphasis added.]

Notwithstanding the clear intent of this language that a statewide approach to increasing regional self-sufficiency is the statutory direction for meeting future water supply needs, some have stated that the legislation establishes a State policy to reduce exports from the Delta. Reduced reliance does not mean absolute reduction. As additional regional supplies are added to meet growth in demands the relative reliance on Delta exports will decrease but the actual level of exports likely will not. Indeed, it is an objective of the Bay Delta Conservation Plan to restore supply lost to recent regulatory actions consistent with the co-equal goals.

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*SFCWA is a Joint Powers Authority of water contractors that receive water from the State Water Project and the Central Valley Project. Together, SFCWA members serve over 25 million Californians and provide water to irrigate more than 3 million acres of the nation's most productive agricultural lands. SFCWA's mission is to assist its member agencies in assuring a sufficient, reliable and high quality water supply for their customers and maximize the efficient operation and integration of the State Water Project and federal Central Valley Project.

May 26, 2010

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Significantly, the "reduced reliance" language is part of a paragraph focused on statewide investment in regional self-sufficiency. The intent is investment in developing new water supplies and improved water use efficiency at the regional and local level will relieve the burden of increasing demands upon the export projects. Proportional demands relying on export supplies will decrease going forward -- the practical result of increasing population growth and large demands remaining unmet in many years because the volume of exports will continue to be limited by regulatory requirements and hydrologic conditions, thus increasing the proportional dependence on regional self-sufficiency to meet future water supply reliability goals.

The conclusion of the Delta Vision Blue Ribbon Task Force related to this issue is informative. In its final report, the Task Force included as one of its twelve *integrated and linked* recommendations:

A revitalized Delta ecosystem will require reduced diversions, or changes in patterns and timing of those diversions, upstream, within the Delta and exported from the Delta at critical times. [Emphasis added.]

It is telling that the legislation did not include any reference to reducing diversions or exports. Instead, the statute establishes a state policy to "reduce reliance" for "future" demands "through" investments in improved regional self-sufficiency. The Legislature recognized that California needs to develop alternative supplies and increase water use efficiency at the local and regional level to meet growing demands. There is no suggestion that exports should be curtailed -- just that whatever level of exports are permitted that they be achieved consistent with the co-equal goals.

As Delta Vision concluded, the main point is that the system should be optimized for both ecosystem restoration and improved water supply reliability by better managing diversions throughout the watershed. This determination presaged the similar recommendations made by the recent National Research Council report which also concluded we must undertake a much more sophisticated approach to Delta management.

The notion promoted by some that State policy is now focused on "reducing exports from the Delta" is a misreading of the statute, creates unrealistic expectations, and is detrimental to informed development of the Council's Delta Plan.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron M. Buck", with a long, sweeping horizontal stroke at the end.

Byron M. Buck
Executive Director



State & Federal Contractors Water Agency

1121 L Street, Suite 1045, Sacramento, CA 95814

July 28, 2010

Chairman Philip Isenberg and Council Members
Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Dear Chairman Isenberg and Council Members:

As you know, last year member agency representatives of the State and Federal Contractors Water Agency ("SFCWA")¹ worked diligently with legislators and their staff to develop key sections of SBX7-1. This historic water policy legislation established the Delta Stewardship Council (Council), defined "coequal goals," directed that efforts to satisfy future increases in statewide water demands focus on non-Delta water sources, conservation and water use efficiency and affirmed the Bay-Delta Conservation Plan ("BDCP") as foundational to resolving water management conflicts in the Delta. Based on our members' close association with the legislative history, we are concerned that the promise of this comprehensive legislation is being jeopardized by recent statements and documents emanating from the Council that do not reflect the Legislature's intent with respect to key aspects of the law. SFCWA provides the following analysis as part of our ongoing dialogue with the Council regarding its mission and authority.

THE INTERPLAY OF THE COEQUAL GOALS AND REDUCED RELIANCE ON THE DELTA

Upon reviewing the Council's discussion of its DHCCP EIR "scoping" comments, and notwithstanding our May, 26, 2010 communication to you specifically addressing this issue (attached), we remain troubled that the Council is still misinterpreting the scope and intent of Water Code section 85021, added by SBX7-1. Section 85021 declares state policy "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Our May letter argued for the Council to interpret section 85021 consistent with the plain meaning of the statutory language. Below, we expand on that argument, as all accepted rules of

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statutory construction not only support our reading of the statute but also refute the often repeated assertion that section 85021 necessitates an absolute reduction of State Water Project (SWP) and federal Central Valley Project (CVP) exports from the south Delta below current levels. The requirement that all statutes be applied in a manner consistent with other goals and policies of the pertinent legislation strengthens our viewpoint as well.

FUNDAMENTALS OF STATUTORY CONSTRUCTION

Statutory construction rules are well established. Their objective is to ascertain and effectuate legislative intent.² In determining legislative intent, the courts first look to the statutory language itself. If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the Legislature's intent.³ However, this "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with the statute's overall purpose.

Moreover, the words of one element of a statute must be construed in context, keeping in mind the overall statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Thus, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and achieve their intended effect.⁴ Even when several separate Codes are involved regarding a particular policy goal, they must be regarded as blending into each other and forming a "virtual" single statute. Accordingly, they must be read together and construed as to give effect, when possible, to all the provisions thereof.⁵

Applying these rules to Water Code section 85021, the Council must first look to the statutory language itself. Specifically, there are two key modifiers to section 85021's general statement that reliance on the Delta should be reduced that are often omitted from conversations regarding its meaning. They are: (1) "future"; and (2) "through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." [Emphasis added.] These modifiers make it clear that the water which is being conveyed through and diverted from the Delta to serve *existing* beneficial uses was not intended to be impacted by this provision. Instead, the statute is directed towards future increases in "water supply needs" and a "statewide investment strategy" to meet them without focusing on the Delta. Any other interpretation would impute to the Legislature intent to strip millions of Californians of the water supplies on which they now rely in complete disregard of the co-equal goals.

Applying the next level of statutory construction and examining how section 85021 fits with the legislation's other provisions, it becomes even clearer that altering current SWP/CVP operations was not the Legislature's intent. The very first section of SBX7-1, which amends Public Resources Code section 29072, sets out the Legislature's fundamental goal -- to ensure that all future efforts to fix the Delta "[a]chieve the two coequal goals of providing a more

² *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468

³ *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735

⁴ *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Moore v. Panish* (1982) 32 Cal.3d 535, 541

⁵ *Mejia v. Reed* (2003) 31 Cal.4th 657, 663

reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” The term “coequal goals” is used fourteen times in the legislation. One of those fourteen instances requires the Council’s Delta Plan to further the coequal goals (Section 85300(a)) and another allows any person to appeal to the Council if implementation of a proposed covered action may “have a significant adverse impact on the achievement of one or both of the coequal goals.” (Section 85225.10(a)) Fostering achievement of the coequal goals is a, if not the, primary purpose of the Council’s activities.

Asserting that SBX7-1 requires the further reduction of water supplies currently available to SWP and CVP contractors would eviscerate one of the coequal goals (“providing a more reliable water supply for California”), and thus ignoring the clear contrary legislative directive. It would exacerbate the current unstable reliability of imported water supplies in SFCWA member agencies’ service areas. In addition, trying to insert development of a response to Section 85021 into the BDCP/DHCCP EIR/EIS as a concomitant focus of analysis and a parallel project purpose is unnecessary, impractical and inconsistent with the timely achievement of the coequal goals.

THE COUNCIL AND SECTION 85021’S POLICY DIRECTION

The standard approach to statutory interpretation also demonstrates that SBX7-1 did not create a power or duty in the Council with respect to implementation of Section 85021. First, Section 85057.5(b)(1) provides that state regulatory actions are not “covered activities” for purposes of Council jurisdiction. Modifying the Delta diversion rights of the SWP and CVP can only be accomplished by the State Water Resources Control Board pursuant to its regulatory authority over water rights. Second, Section 85057.5(b)(2) states that operation of the SWP and CVP are not covered activities subject to the Council’s review and appellate authority. Finally, Section 85031(d) specifically disclaims any legislative intent to interfere with or impact substantive protections related to water rights. All of these sections demonstrate that the policy statement found in Section 85021, and the statewide investment program to meet future water demands to which it refers, is a distinct and separate program outside the purview of the Council’s authorities. However, the Council can and should play an important role in monitoring progress toward the achievement of Section 85021’s policy goal through activities implemented outside the BDCP/DHCCP process.

THE BDCP AS AN ELEMENT OF THE DELTA PLAN

Water Code section 85320(e) directs the Council to make the BDCP an element of the Delta Plan if the Department of Fish and Game (DFG) makes certain findings. The exact language is:

If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. § 1531 et seq.), the council shall incorporate the BDCP into the Delta Plan.

This language clearly establishes that the Legislature granted DFG the primary authority to determine if the BDCP meets the statutory standards for inclusion in the Delta Plan. The Council, however, has been accorded an appellate role if a third party questions DFG's determination that the BDCP meets the requirements of Section 85320. The last sentence of subsection (e) states, rather opaquely: "The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council." The Council is also required to hold one hearing before incorporating the BDCP into the Delta Plan (Water Code section 85320(d)).

While SBX7-1 is silent as to the scope of the Council's review if an appeal is filed, the legislation does state in Section 85322:

This chapter does not amend, or create any additional legal obligation or cause of action under, Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code [the NCCP Act] or Division 13 (commencing with Section 21000) of the Public Resources Code [CEQA].

Thus, it is at least clear that the Council's required hearing and its appeal authority cannot be used to require more from the BDCP than is required under these governing environmental laws. However, because SBX7-1 is silent on the appeal process and the scope of review if an appeal is lodged pursuant to section 85320(e), analogies to other laws should be used to address this lack of legislative guidance.

THE BDCP AS AN HCP

Starting with the straightest forward of Section 85320(e)'s required elements, holding a hearing or processing an appeal on the question of whether the federal fish agencies have approved the BDCP as a habitat conservation plan pursuant to the federal ESA, would be a meaningless act. From a federal supremacy viewpoint, the federal fisheries agencies have the exclusive authority to determine whether the BDCP constitutes an HCP under the applicable federal laws they administer. The issuance of the HCP and its associated take authority by those federal agencies will be conclusive on all parties as to whether the BDCP has met that condition of Water Code section 85320(e).

THE BDCP'S COMPLIANCE WITH CEQA

With respect to CEQA and the DHCCP EIR, as noted above, Section 85322 clearly states that otherwise applicable CEQA requirements are not modified by Sections 85320 and 85321. Thus, the determinations DFG will make are (a) whether all of the topics listed in Water Code section 85320(b)(2)(A) through (G) have been included in the DHCCP EIR and (b) have those topics been adequately addressed within the EIR as required by CEQA and its Guidelines. In making this second determination, DFG will be acting as a responsible agency for the DHCCP EIR, and will have, prior to the time it approves the BDCP as an NCCP, affirmatively, or by operation of law if it fails to timely challenge the EIR, determined that the EIR complies with CEQA's requirements. Public Resources Code section 21167.3, in particular, brings about this result. It states:

(a) If an action or proceeding alleging that an environmental impact report or a negative declaration does not comply with the provisions of this division is commenced during the period described in subdivision (b) or (c) of Section 21167, and

if an injunction or stay is issued prohibiting the project from being carried out or approved pending final determination of the issue of such compliance, *responsible agencies shall assume that the environmental impact report or the negative declaration for the project does comply with the provisions of this division and shall issue a conditional approval or disapproval of such project according to the timetable for agency action in Article 5 (commencing with Section 65950) of Chapter 4.5 of Division 1 of Title 7 of the Government Code.* A conditional approval shall constitute permission to proceed with a project when and only when such action or proceeding results in a final determination that the environmental impact report or negative declaration does comply with the provisions of this division.

(b) In the event that an action or proceeding is commenced as described in subdivision (a) but no injunction or similar relief is sought and granted, *responsible agencies shall assume that the environmental impact report or negative declaration for the project does comply with the provisions of this division and shall approve or disapprove the project according to the timetable for agency action in Article 5 (commencing with Section 65950) of Chapter 4.5 of Division 1 of Title 7 of the Government Code.* Such approval shall constitute permission to proceed with the project at the applicant's risk pending final determination of such action or proceeding.

(Italics added.)

Fundamentally, this provision instructs agencies that will be taking actions related to a project that is the subject of an EIR to treat that EIR as adequate until a court has ruled to the contrary. Because the Council is such an agency for purposes of the DHCCP EIR (Water Code section 85320(c)), it is subject to Public Resources Code section 21167.3's mandates. Thus, an appeal contending the DHCCP EIR is inadequate under CEQA would not be within the Council's jurisdiction to decide.⁶ That task is left to the courts and the Council will be constrained by the dictates of Public Resources Code section 21167.3. Further, the full body of law cannot be interpreted to allow a disgruntled individual or entity to evade the Public Resources Code's mandatory procedures for challenging the adequacy of an EIR (including its 30-day statute of limitations) by filing an appeal with the council -- particularly in the case of the DHCCP EIR where, with probable certainty, that would result in parallel proceedings, one before the Council and one in the courts, on the same legal and factual issues.

We are aware that some have suggested that the Council could make a determination, in response to an appeal, that the DHCCP EIR is inadequate and not be in violation of Public Resources Code sections 21167(a) and (b). We are, quite frankly, stunned by an assertion that the Council could act extra-judicially to declare the DHCCP EIR inadequate when that EIR was before a court on the same issue and still be in compliance with Sections 21167(a) and (b).

⁶ See May 20, 2010 Memo from Tara Mueller to Chris Steven, General Counsel, Delta Stewardship Council, where (at pages 9 and 10), the Attorney General's office recognizes that the Council is acting as a responsible agency when it decides an appeal and that responsible agencies must either accept the lead agencies' EIR or challenge it in court within thirty days of the date that the lead agency files its notice of determination.

Would that same argument be made if a court had ruled the EIR adequate? The law is very clear in this area. State and local agencies that act on projects for which they are not lead agencies “shall assume” that the EIR is adequate unless they have judicially challenged the EIR themselves. The fact that a contrary assumption would not “invalidate the EIR” (See May 20, 2010 Attorney General’s Memo, at page 10.) is irrelevant if the effect of the contrary assumption is to impact the ability of the subject project to proceed.

THE BDCP AS AN NCCP

As the starting point for this analysis, it is fundamental that DFG has been designated by the Legislature as the entity empowered to protect the fish and wildlife resources of the State. (Fish and Game Code section 711.7(a): “The fish and wildlife resources are held in trust for the people of the state by and through the department.” See, also, Section 1000 relating to the Department’s obligation to carry out the research needed to ensure the conservation and protection of fish and wildlife.) DFG is the State agency with the greatest expertise and authority over the resources intended to be protected through the BDCP.

The NCCP Act, in particular Fish and Game Code sections 2810, 2815 and 2820, requires DFG, before deciding whether to enter into an NCCP agreement, to make many highly technical judgments based on the existence of “substantial evidence” which have been informed by a lengthy, exhaustive public process. (See Fish and Game Code section 2820(a).) For the BDCP, the Planning Agreement’s structure and process were approved only after DFG and all interested parties were satisfied that they met all the NCCP Act’s procedural requirements. Consequently, the decisions made by DFG regarding satisfaction of NCCP must be given great deference by the Council.

A consistent string of appellate court decisions hold that judicial appeals from DFG actions mandate such deference, and there is no reason to believe that the Legislature intended to deviate from that approach when it granted the Council authority to hear an appeal from DFG’s NCCP determination under Water Code section 85320. Equally important, it is clear that issuance of an incidental take permit pursuant to Fish and Game Code section 2835 (which will be an integral element of the BDCP) is an adjudicatory action subject to challenge only by administrative mandamus under Code of Civil Procedure section 1094.5. Thus, in any judicial review of a DFG NCCP determination, the abuse of discretion standard would be applied.

In *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 516, the California Supreme Court described the role of appellate bodies in appeals from adjudicatory decisions as follows:

Administrative agency decisions in which discretion is exercised may generally be challenged by a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal. Rptr. 836, 522 P.2d 12] (*Topanga*), we considered the meaning of subdivision (b) of that statute, defining “‘abuse of discretion’ to include instances in which the administrative order or decision ‘is not supported by the findings, or the findings are not supported by the evidence’ ” and subdivision (c), wherein “ ‘abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.’ ”

In addition, the decisions in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 674, and *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336, make clear that review of administrative decisions should accord substantial deference to the agency. The administrative determinations are presumed correct, and all doubts should be resolved in favor of the administrative determination. These concepts are based on the well understood premise that the burden on appeal to establish error is on the parties who challenge the administrative decision.

It bears emphasizing here that cases such as *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection*, (2004) 123 Cal.App.4th 1331, 1351, stand for the proposition that when environmental assessments involve complex scientific questions requiring a high level of technical expertise (such as is the case with the BDCP), and absent a showing of arbitrary action, appellate bodies leave the conclusions to the informed discretion of the agency.

SFCWA believes that these cases and, in particular, the fact that any appeal to the Council related to the NCCP Act will by definition involve an adjudicatory decision (granting incidental take authority) that is within the exclusive jurisdiction of DFG, lead to only one possible conclusion. Any such appeal should be limited to the question of whether DFG's decision to enter into the NCCP agreement and grant incidental take authority was an "abuse of discretion" as defined by the California Supreme Court.

Finally, the SFCWA does not believe that the subject legislation can be properly interpreted to grant groups or individuals that are dissatisfied with the NCCP and its associated take authorization the ability to choose either an appeal to the courts with a deferential "abuse of discretion" standard of review or to the Council with an asserted "de novo" standard of review. This would be a particularly difficult conclusion to reach when there is no evidence that the Legislature has determined that the Council is better equipped or has more expertise than DFG to make the types of technical, scientific, and policy decisions that the Legislature comprehensively delegated to DFG when it passed the NCCP Act in 1991. Thus, the scope of review upon an appeal to the Council should be no different than would be accorded to a plaintiff/petitioner in the courts.

We appreciate your consideration of the content of this letter and look forward to further discussion with the Council as it develops its Delta Plan.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron M. Buck", with a stylized, flowing script.

Byron M. Buck
Executive Director

Attachment